83-1069

No._____

SUPREME COURT OF THE UNITED STATES

October Term, 1983

Frank R. Sargent,
Appellant,

vs.

California Supreme Court,
California Court of Appeal-second
Appellant District,
Great American Insurance Co.,
Appellees.

On Appeal from California Supreme Court on Judgement issued by Court of Appeal-Second Appellate Dist.

JURISDICTIONAL STATEMENT

Frank R. Sargent
Appellant, pro se
41 B Street
Laurel, Maryland 20707

(301) 498-8742

QUESTIONS PRESENTED FOR REVIEW

1. Is the jurisdiction of the United States Supreme Court invoked when litigant, in opposing Trial Court's abatement of trial beyond State statute's time limitations, pleads that he is denied constitutional rights to due process by being subjected to dismissal by the statute, and he subsequentally is so dismissed, and do circumstances in the instant case constitute a challenge to the validity of the statute?

2. Is California dismissal statute repugnant to the United States Constitution in that, by the terms of the statute, it suggests that the State's desire to end litigation supersedes the constitutional right to due process?

3. Is California dismissal statute unconstitutional in that the statute gives rise to the irrebuttable presumption that all civil litigations can be brought to conclusion by trial on merits within five years?

4. Should the Supreme Court extend its review to factual questions when record shows Federal Rights (to Due Process) were asserted at Trial Court level when Trial Court vacated pre-trial conference date and continued trial to a date beyond stipulated time to try case?

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Judgement issued by the Superior Court of San Francisco, Opinion of the California Court of Appeal-Second District, and Orders of the Court of Appeal and the California Supreme Court in denial of rehearing and hearing are listed in the Index to the Appendix and are set forth verbatim in the Appendix.

JURISDICTION

This appeal arises from an Opinion of the California Court of Appeal whereby the Court affirmed a Judgement dismissing the petitioner in the Superior Court of San Francisco County for a failure to bring his action to trial within statutory time, as defined by California Code of Civil Procedure-Section 583(b).

The Opinion sought to be reviewed issued from the Court of Appeal-Second District on July 28, 1983. The same court

denied a petition for Rehearing on August 25, 1983 and on October 5, 1983 the Supreme Court of California denied a Petition for hearing. Notice of Appeal was filed in the State Supreme Court on October 25, 1983.

Statutory authority for this appeal is found in 28 USC 1257 (2). Additional authority is found in prior Supreme Court decisions:

(NEW YORK EX REL. BRYANT VS. ZIMMERMAN (1928) 49 S.CT.61,63, 278 U.S.63, 67, STROET VS. N.Y. (1969) 89 S.CT.1354,1362. 394 U.S.576.)

(THIS COURT WILL REVIEW THE FINDINGS OF A STATE COURT WHEN A FEDERAL RIGHT HAS BEEN DENIED AS A RESULT OF A FINDING SHOWN BY THE RECORD TO BE WITHOUT EVIDENCE TO SUPPORT IT.)(FISKE VS. KANSAS (1927) 47 S.CT. 655, VACHON VS N.HAMP.,(1974) 94 S.CT.664, 414 U.S.478.)

The United States Constitution-V and XIV amendments, Federal Rules of Procedure-Rule 41 and California Code of Civil Procedure-Section 583 are involved and each is set forth verbatim in the Appendix to this Jurisdictional Statement.

STATEMENT OF THE CASE

This controversy arises from a fire loss on January 6, 1973 to property owned by the appellant Frank R. Sargent that was insured by the appellee Great American Insurance Company. Sargent filed a claim with Great American for a loss in excess of One Hundred-Ninety Thousand Dollars ($190,000.) but Great American refused to pay the claim. Sargent then demanded arbitration pursuant to the insurance contract and an arbitration award of approximately One Hundred-Nine Thousand Dollars ($109,000.) was made on

Sargent's behalf, however, Great American still refused to pay.

On January 4, 1974, two days before expiration of time to sue, Sargent's legal counsel (Melvin Belli) filed a suit against Great American in San Francisco Superior Court alleging Breach of Contract and Fraud (Complaint-C.R. 1.) Great American filed a response (C.R.37) on Feburary 14, 1974, raising for the first time alleged Defenses on Contract. Shortly thereafter Great American undermined the client-lawyer relationship of Sargent and Belli and Mr. Belli withdrew as counsel.(C.R.50) On July 1, 1974 Great American filed an interpleader action in another jurisdiction (Shasta County California) to litigate the alleged contract defenses already joined in litigation in the herein underlying case. Sargent retained counsel (Marshall S. Mayer) who

represented him throughout the Shasta case. On February 15, 1977 a Judgement issued from the Shasta Court whereby Sargent was found to have breached the insurance contract and that Great American was not liable to him for his fire loss.

At this point in time, over four years after his fire loss, Sargent had lost his motel property through foreclosure, and just about everything else he owned. He was faced with a dilemma, either forget his San Francisco case and any hope of appealing the Shasta judgement or attempt to go foreward with both cases as his own counsel. He chose the latter course and pursued an appeal of the Shasta judgement that ultimately, on October 1, 1979, culminated in a reversal of the Shasta judgement by the Court of Appeal-Third Appellate District of Cali-

fornia, on the grounds that the Shasta litigation of the alleged contract defenses was entirely improper.(C.R.285)

During pendency of the Shasta appeal Sargent retained counsel for his San Francisco case (James G. Thompson) (C.R.51) but, unable to continue payment for services, Sargent, entering the case pro per proceeded to prepare for trial. He deposed several witnesses, conducted extensive discovery and, because of time lost in the Shasta case, he filed a motion to advance his case on the calendar.(C.R.89) As a compromise to advancing the case on the calendar, Great American, on December 12, 1977, executed a stipulation (stipulation set forth verbatim in appendix) where Sargent was allowed to bring his case to trial at any time before April 1, 1980 (a date six

months after remittitur in the Shasta case.) Sargent retained the stipulation but did not file it as he was still trying to get his case to trial before the original statutory period expired on January 1, 1979. The stipulation could be filed at any time prior to that date if necessary, to avoid dismissal pursuant to the five (5) year dismissal statute, CCP 583(b).

Great American participated fully in Sargent's discovery procedure and on August 24, 1978 he filed a Special Request for Pre Trial Conference. The conference was ultimately set for December 12, 1978. Great American filed a Motion to Continue the Pre-trial conference and Trial in the case pending decision of the Shasta appeal. At hearing on October 25, 1978 the Trial Court granted Great American's motion. It was in response to Great

American's Motion to Continue the Case where Sargent first raised the FEDERAL QUESTION by objecting to the delay as a violation of his Constitutional rights to Due Process. He alleged that, if the scheduled pre-trial conference and trial was continued he would be, and he subsequently was, dismissed pursuant to CCP-583(b).(C.R. 148:1-5)

Sargent immediately noticed a Motion to Rescind Order Continuing Case and reiterated his fears of dismissal pursuant to CCP-583(b)(C.R.153A) Sargent also expressed his concern about being dismissed at hearing on the motion. (Pertinent portions of Reporter's Transcript of hearing on Sargent's motion are reproduced in the attached Appendix at pages 17 through 19. Relevant portions of the pleadings at both hearings is also reproduced in the Appendix at page 18.)

Sargent's concern was focused upon the fact that Great American's Motion to Continue(which ultimately became the actual order because counsel never prepared and submitted one), used exactly the same terminology and expiration date as was stated in the stipulation executed by Great American earlier on December 12, 1977. Sargent pointed out to the Court, in his pleadings and at oral argument, that Great American had designed both to expire "six months after decision in the Shasta appeal", placing Sargent in the untenable position of being unable to do anything to bring his case to trial until Great American could move, at its pleasure, to dismiss the case pursuant to CCP-583(b). The Court denied Sargent's Motion to Rescind the Order Continuing the Case and refused to modify the order to protect Sargent's due process rights.

Immediately upon learning of the favorably decision on the Shasta appeal Sargent began trying to bring his case to trial. This, even though in point of fact Sargent was prohibited from doing anything to bring his case to trial before April 1, 1980, pursuant to the order continuing the case. In the meantime Great American was doing everything it could to frustrate Sargent's efforts, such as refusing to attend a trial setting conference(C.R.437) and setting Motion for Change of Venue.

On March 28,1980 Great American filed a Motion to Dismiss the case pursuant to CCP-583(b) and at hearing on June 25 24, 1980 the Court granted the motion and issued its Judgement.(C.R.348) On August 20, 1980 Sargent filed Notice of Appeal.(C.R.428.

Sargent's brief on appeal to the California Court of Appeal reasserted the unconstitutionality of his dismissal under CCP-583(b) and , alternatively, sought relief pursuant to Judicial Exceptions that the California Courts have erected to avoid dismissal pursuant to CCP-583(b). On July 28, 1983 the Court of Appeal-Second District issued an Opinion that expressly denied Sargent relief pursuant to the aforesaid judicial exceptions to CCP-583(b). Motion for Rehearing was denied on August 25, 1983 and on October 5, 1983 the California Supreme Court refused a hearing. Appeal to the U.S. Supreme Court was filed with the California Court of Appeal and Supreme Courts on October 25, 1983.

SUBSTANTIALITY OF QUESTIONS

FIRST QUESTION

Whether the circumstances of this case are obvious enough to convince the Supreme Court to assume jurisdiction is of paramount concern to the petitioner. The concern arises from the California Court of Appeal's total misconstruction of factual issues involved in the dismissal of the petitioner by the trial court and, more importantly, its utter failure to address the issue of petitioner's constitutional rights to due process as said rights were raised in the trial court and again on appeal.

The record is wanting for clarity, however, facts essential to the issue can be ascertained. Relevant portions of pleadings and trial transcripts, excerpted from the massive record, have

been included in the Appendix to this Jurisdictional Statement.

The petitioner defended against the Trial Court's abatement of trial beyond statutory time by stating categorically that he would be unconstitutionally denied his rights to due process by dismissal pursuant to California Code of Civil Procedure (CCP) 583(b). He subsequently was dismissed precisely as he alleged he would be and his unsuccessful attempt to obtain alternative relief, by way of judicial exceptions to CCP-583(b), does not mitigate his clear challenge to the validity of the statute.

The Court is requested to carefully consider the cited excerpts from the record set forth in the Appendix on pages 15 to 19.

SECOND QUESTION

California dismissal statute, CCP-583(b)(Statute set forth in its entirety at Appendix, page 20), is repugnant to the United States Constitution in that the statute appears to determine that State's desire to terminate litigation within specific time limitations is more compelling than the honoring of Constitutional rights to due process, or even the equitable doctrine of a trial on merits. The statute is inflexible and deemed mandatory. (Lord vs. Ingles(1944) 149 P.2d 72, 64 C.A.2d 559; Bosworth vs. Superior Court of Los Angeles(1956) 143 C.A.2d 775).

CCP-583, subsection (f) provides for two (2) of only three (3) circumstances contemplated by the statute to be exempt from mandatory dismissal. Only when the defendant is not amenable to process and

when the jurisdiction of the trial court is suspended will the plaintiff not be subject to mandatory dismissal. CCP-583(b) provides the only other alternative, when parties have stipulated to an extension of time beyond the statutory limits, providing small comfort to a harried plaintiff who must seek cooperation and participation from his adversary. An adversary who is waiting expectantly to win his case by default and who, in many cases, has contributed wilfully to the delays, as in the instant case.

California courts have created judicial exceptions to the mandatory dismissal requirements of CCP-583(b) but such judicial acts do not cure the constitutional infirmities of the statute. Instead, they only point up the contempt

with which the California courts themselves view the statute. Notwithstanding the judicial exceptions, entirely blameless litigants have been dismissed pursuant to CCP-583(b) for delays entirely beyond their control, such as inability to obtain a timely trial date (Governale vs Bethlehem Pacific (1965) 235 C.A.2d 837), inability to complete discovery (Langan vs. McCorkle (1969) 276 C.A.2d 805), and even when the Court prevented the case from going to trial by its own order, as in the instant case.

Such harsh, unyielding dismissal rules are not contemplated by other jurisdictions, and particularly the Federal Court's dismissal rule (Rule 41(b), set forth in Appendix at page 21), where no specific time for trying an action is contemplated and any reasonable showing of diligence will avoid dismissal

(Dyotherm vs. Turbo Mach. Co. 392 F.2d 146), and in all events, a federal dismissal will rest on equitable principles.

Although the previously mentioned judicial exceptions created by the California courts are commendable and have without doubt prevented numerous miscarrages of justice they do not cure the problem, for without statutory protection the litigant is still subject to arbitrary and capricious application of the exceptions, as in the instant case. Further, the exceptions demonstrate eloquently the need to abolish the unconstitutional statute or to modify the statute in a way to serve the State's desire to end stale litigation without trampling into dust the tenets of due process and trial on merits. An amendment to bring the judicial exceptions within

the statute would serve the state's needs and avoid diminishing the rights to due process guaranteed by the United States Constitution.

THIRD QUESTION

CCP-583(b) requires that any action, including a jury trial on merits, must be completed within five (5) years or be subject to mandatory dismissal. Such a requirement, in the posture of present litigation particularly in California, is ludicrous and entirely unrealistic. Informed sources tell the petitioner that about half of the jury trials in California are extended beyond the five year limitation.

Many of these cases waive the five year limit as a compromise to a motion to advance the cause on the calendar, as in the instant case. Others are freely

stipulated to by defendants who themselves are unable to prepare properly for trial within the five year term.

The Constitutional rights to due process contemplates not only a right to go to trial but a right to properly prepare for the trial without an unreasonable timetable hanging overhead. The statutory requirements of CCP-583(b) are an unwarranted harassment and cause a near paranoid atmosphere to exist in the California court system. An understanding of this can be gained by following the routine procedure of most attorneys who file actions there, particularly in the San Francisco and Los Angeles areas. It goes somewhat as follows:

As soon as an attorney for a plaintiff in a civil action recieves an answer to his complaint he immediately, and

automatically, files an At Issue Memorandum with the Court. He knows he must do this because it will be approximately two (2) years before he will be advised that he can file a Certificate of Readiness. He can then expect to wait about another year for a trial date.

When he filed his At Issue Memorandum the attorney was required to state that he was ready to go to trial, except for some procedural matters, including some discovery. The fact is, he had filed no interrogatories, taken no depositions, produced no documents, etc. In short, he was ready to get ready to go to trial.

If discovery or other cause makes the filing of an amended complaint necessary, everything is wiped out. He must start all over again, at the end of a very long line, and file another At Issue Memorandum. How many cases go to trial on

the original complaint? How many defense lawyers file responsive pleadings before the very last day allowed?

All courts are equipped to deal with stale claims and negligently tardy litigants, therefore, a club such as CCP-583(b) hanging over a litigant's head is unnecessary. Furthermore, the right to peaceful and unmolested due process contemplated by the Constitution is diminished by such a requirement. Any state statute that diminishes a constitutional right is unlawful.

The irrebuttable presumption inferred by CCP-583(b), that any litigation should, and can, be concluded within five years is clearly erroneous and not compatible with constitutional rights to due process.

FOURTH QUESTION

Notwithstanding the unconstitutional strictures of CCP-583(b) and the mandate that the statute be modified or vacated, this petitioner has been inequitably and unlawfully denied his rights to benefits derived from the aforementioned judicial exceptions to the statutory requirements of dismissal.

There is ample precedent for the Supreme Court to intervene in such circumstances:(Henry vs. Miss., 85 S.Ct. 567, 379 U.S. 447)

Under ordinary circumstances this plaintiff might well have not been dismissed for he has the same elements in his case that is present in many cases where the California courts applied the judicial exceptions and avoided dismissal. MARCUS (Infra) is identical to

this case essentially in every respect. As herein, the court had prevented the case from proceeding to trial and the plaintiff could be charged with no delay.

The miscarriage of justice in this case arises from a failure of the California Court of Appeal to discern that a stipulation, executed for the plaintiff several months before the case was interrupted, was not involved as a part of the continuance, except being nullified by the Court's order that no trial proceedings take place until the stipulation expired.

The Court of Appeal's refusal to reexamine the record, and the California Supreme Court's similar action, only compounded the injustice.

Because of the Court of Appeal's initial misunderstanding of the facts surrounding the stipulation the Court's

Opinion (Appendix-1) is a plethora of erroneous conclusions founded on the first mistake.

The Court found that on September 9, 1978 the petitioner had only four months to bring his case to trial.(Seventeen months was correct, pursuant to stipulation.) It also found, incongruously as the record nowhere suggests it, that he had six months from the Shasta appeal decision to bring his case to trial. If he had any time at all it was a term equal to the court imposed delay, about seventeen months.

The bottom line is, the petitioner was denied his rights to due process and equal protection under the law, as guaranteed by the Constitution, due to a misunderstanding of a factual issue by the California Court of Appeal.

The questions presented by this appeal are of substantial import in that they address an ongoing problem for innumerable litigants, now and in the future, who will be confronted with possible loss of their constitutional rights to due process and equal protection. Plenary examination of the cited State statute by this Court is warranted, with full adjudication of the constitutional issues raised to effect a permanent solution.

Controlling state law on the issue of whether the petitioner is entitled, under the circumstances of the case, to relief from dismissal pursuant to CCP-583(b) is set forth in MARCUS VS. SUPERIOR COURT OF ORANGE COUNTY (1977) 75 C.A.3d 204, as follows:

(6) REAL PARTY'S ASSERTED FEAR, THAT THE GRANTING OF A STAY WILL SUBJECT HIM

TO THE RISK THAT THE FIVE YEAR PERIOD PRESCRIBED BY SECTION 583, SUBDIVISION (b) WILL EXPIRE IS UNFOUNDED. IN DETERMINING WHETHER THE PRESCRIBED FIVE YEAR PERIOD HAS EXPIRED, TIME DURING WHICH IT IS IMPOSSIBLE OR IMPRACTICABLE TO PROCEED TO TRIAL IS EXCLUDED. (SEE e.g., CROWN COACH VS. SUP. COURT 8 CAL. 3d 540, 547-548: esp. fn. 5 (105 Cal. Rptr. 339, 503 P.2d 1347): BRUNZELL CONST. CO. VS. WAGNER 2 CAL.3d 545, 553-54 (86 Cal. Rptr. 297, 468 P.2d 553; 4 WITKENS, CAL. PROC. (2nd ed. 1971) Proceeding without trial, ss 94, 103-106, pp 2755, 2765-2772.) WHILE THE STAY ORDER IS IN EFFECT, IT WILL BE IMPOSSIBLE OR IMPRACTICABLE TO PROCEED TO TRIAL. THEREFORE, THE FIVE YEAR PERIOD CANNOT EXPIRE BECAUSE A STAY IS ORDERED.)

CONCLUSION

By reason of the foregoing, the Court should assume jurisdiction in this matter, order briefing and adjudicate the issues. Alternatively, order the California Court of Appeal-Second district to afford the petitioner a trial on merits and make a summary findings that California Code of Civil Procedure is VACATED as conflicting with the Constitution of the United States.

CERTIFICATE OF SERVICE

It is hereby certified that true and correct copies of the foregoing Jurisdictional Statement on Appeal to the United States Supreme Court was mailed on this date, postage prepaid, to the parties as named below.

Dec. 29, 1983

Frank R. Sargent
Appellant in
Pro se

Court of Appeal-Second District
3580 Wilshire Blvd.
Los Angeles, Ca. 90010

California Supreme Court
4250 State Bldg.
San Francisco, Ca.94102

Attorney General:
State of California
Sacramento, Ca.

Patrick J. Mahoney
Cooley,Godward,Castro,Huddleson & Tatum
5 Palo Alto Square-Suite 400
Palo Alto, Ca. 94306

NOT FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA-SECOND APPELLATE DISTRICT DIVISION FIVE

FRANK R. SARGENT, Plaintiff and Appellant,	)	2 Civil No. 68512
vs.	)	(STAMP)
GREAT AMERICAN INSURANCE CO. et al., Defendants and Respondents.	)	Court of Appeal July 28, 1983

APPEAL from a judgement of the Superior Court of San Francisco County. Hon. Ira A. Brown, Jr., Judge. Affirmed.

Frank R. Sargent in propria persona.

Cooley,Godward,Castro,Huddleson & Tatum, Patrick J. Mahoney and Daniel Alexander, for Respondents.

Plaintiff and appellant Frank R. Sargent appearing in propria persona appeals from a dismissal of his case for failure to bring the matter to trial within five years pursuant to Code of Civil Procedure section 583(b). Although Plaintiff has given us an extensive

breakdown on the reasons for delay in prosecuting the action, this case turns on one basic fact, namely that the parties by stipulation agreed that the five-year period could be extended subject to certain conditions, with which plaintiff did not comply.

Because the stipulation is controlling, only the facts surrounding the stipulation are necessary. In connection with plaintiff's action against Great American an interpleader action had been filed in Shasta County and both plaintiff and Great American mistakenly thought said action might have some collateral affect upon the present action. After a ruling on the interpleader action, an appeal was taken which eventually led to the above stipulation. Plaintiff had filed a certificate of readiness on July

18, 1978, and a trial setting conference was set for October 24, 1978. On September 5, 1978, plaintiff filed a Special Request for Pretrial Conference. Consequently, on September 9, 1978 the court cancelled the pending trial setting conference and set a pretrial conference for December 12, 1978. On September 9, 1978, only four months remained before expiration of the five year period on January 4, 1979. Plaintiff then filed a Motion to Shorten time for Pretrial Conference pointing out the short time left before the five-year period expired. Great American then filed a motion for continuance to be heard concurrently with plaintiff's motion.

On October 19, 1978, the day of the hearing on the two motions, plaintiff filed a stipulation extending the five year period signed by himself and by

attorneys for Great American. The stipulation reads as follows: "It is hereby stipulated by and between the plaintiff Frank R. Sargent and defendant Great American Insurance Company that defendant Great American Insurance Company shall not move to dismiss this action under Code of Civil Procedure section 583 for failure to prosecute within five years, until at least six months after the appeal becomes final in the case of Great American Insurance Co. v. Corradetti, et al. Superior Court of the State of California for the County of Shasta, Action No. 49628, which is now pending in the Court of Appeal Third Appellate District Action No. 3 Civil 17097. Six months after the remitter (sic) is filed in said appeal, defendant may, if it chooses, seek the dismissal of this action pur-

suant to Code of Civil Procedure section 583."

In view of the stipulation plaintiff withdrew his motion to advance and the court granted Great American's motion for a continuance. Although there were other subsequent motions between parties, the next important fact is the remittitur in the Shasta appeal came down on October 1. 1979. Plaintiff thus had until April 1, 1980, to commence the trial.

On October 25, 1979, the court noticed a Trial Setting-Arbitration Conference for January 7, 1980. Due to plaintiff's illness the trial setting conference was reset to February 4, 1980, and at that conference plaintiff chose May 27, 1980 as the trial date for his cause of action.

After the six-month period agreed to in the stipulation had expired, Great

American moved to dismiss the action under section 583(b). The motion was granted, the judgement of dismissal was signed on June 23, 1980, and this appeal followed.

The only issue on appeal is whether the trial court abused its discretion in dismissing plaintiff's action for failure to bring it to trial within the six-month period following the filing of the remittitur.

Plaintiff argues that the court abused its discretion in granting the motion for the following reasons: (1) The case was abated pending final judgement of the appeal in the Shasta court, and therefore, the five year period was suspended during that time per Code of Civil Procedure 583(f); and, (2) Great American repeatedly misled plaintiff by assurances

that he would have his case tried in court. In addition to these basic contentions, plaintiff then seeks to argue the merits of his cause of action against Great American in an attempt to demonstrate that he is entitled to his day in court.

There is certainly no ambiguity in the stipulation signed by the parties. Plaintiff knew or should have known at all times that he had only six months after the remittitur was filed in the Shasta action to bring his case to trial.

Although plaintiff appeared at all times below and here in propria persona, the record clearly demonstrates that he was aware of the time limitations set forth in section 583(b). At the time of the stipulation, it could not have been legally determined that the appeal in the collateral action in Shasta rendered it

impossible to try the current action before the five year period expired. Not all appeals involving collateral matters bring 583(f) into operation.1/ Therefore, it was quite legal for the parties to agree on a continuation of the five year period that solved any 583(f) problems and which gave plaintiff adequate time to set his case for trial after the remittitur was issued.

Section 583(b) states that an action shall be dismissed for failure to bring it to trial within five years of its filing. The term may be extended by written stipulation or by oral stipulation entered in the minutes of the

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1. See Southern Pac. Co. v. Superior Court, 157 Cal.App.2d 168,177.

court. For the reasons stated above, the exception of 583(f) is unavailable to plaintiff; therefore his first argument is meritless.

Plaintiff's second argument appears to be that the court and Great American in some manner or another guaranteed him his day in court. His arguments are stated in conclusions and references in support of these conclusions are not factually correct or not supported by the record. Plaintiffs argument and the record do not overcome the clear language of the stipulation. Nothing that he has said or argued has overcome the fact that he was plainly aware of the six month requirement. He had the wherewithall to bring the action to trial within six months after the remittitur was filed, but did not. Not only is it clear that the court did not abuse its discretion in

granting the motion, it is just as obvious that the court had no discretion to deny the motion.

Plaintiffs other arguments do not relate to appealable issues. Plaintiff's request for finding of fact and conclusions of law were and are now inappropriate as they were not required in connection with the granting of the motion to dismiss under section 583(b).

The judgement for dismissal is affirmed.

NOT FOR PUBLICATION.

HASTINGS, J.

We concur:

FEINERMAN, P.J.

ASHBY, J.

(Post Card-Dated August 25, 1983)

Clerk's Office
Court of Appeal
Second District

Los Angeles, Ca. August 25, 1983

Sargent

Title No.68512
Great American Ins. Co.

Rehearing denied.

Clay Robbins, Clerk

(Postcard-Dated October 5, 1983)

Clerk's Office,Supreme Court
4250 State Bldg.
San Francisco, Ca. 94102

October 5, 1983

I have this day filed Order_____

_____Hearing denied_____

In re: 2 Civ No. 68512

Frank R. Sargent v. Gt.Am. Ins. Co.

Clerk

2 Civil No. 68512
(Formerly 52157-1st Dist.)

IN THE SUPREME COURT
STATE OF CALIFORNIA

FRANK R. SARGENT,
Plaintiff and Appellant,
vs.

GREAT AMERICAN INSURANCE CO.,
Defendant and Respondent.

NOTICE OF APPEAL

CLERK OF THE COURT:

Please enter an appeal in this case, on behalf of the Plaintiff/appellant, to the U.S. Supreme Court in the denial of Petition for Hearing in the California Supreme Court on October 5, 1983.

Appellant relies, in part, for this appeal on 28 USC Section 1257 (2).

Frank R. Sargent
Plaintiff/appellant

41 B Street
Laurel, Md. 20707

(301) 498-8742

Executed on October 25, 1983
at Laurel, Md.

(Defendant's attorney,
names and address)

SUPERIOR COURT-STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

FRANK R. SARGENT, Plaintiff, vs. GREAT AMERICAN INS. CO., ET AL., Defendants.	No. 669-556 JUDGEMENT

Defendant Great American Insurance Company's motion to dismiss the action for failure to bring to trial within five years came on regularly for hearing on April 22, 1980. Plaintiff Frank R. Sargent appeared in propria persona and Patrick J. Mahoney appeared on behalf of defendant Great American Insurance Company. The Court having read the moving papers and opposition thereto, having reviewed the other filings in the matter and having heard argument of counsel, and the Court having granted the motion in its Minute Order dated June 18, 1980.

IT IS ADJUDGED:

1) That plaintiff Frank R. Sargent take nothing by his complaint; and the action be dismissed with prejudice.

2)That defendant Great American Insurance Co. recover its taxable costs of suit from plaintiff Frank R. Sargent.

Dated June 23, 1980

/S/_____
Ira A. Brown Jr.
Judge of the Superior Court

(Attorneys for Defendant
Names and address)

SUPERIOR COURT-STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

FRANK R. SARGENT, Plaintiff, vs. GREAT AMERICAN INS. CO. Defendants.	No. 669-556 STIPULATION

It is hereby stipulated by and between the plaintiff Frank R. Sargent and defendant Great American Insurance Co. that defendant Great American Insurance Company shall not move to dismiss this action under Code of Civil Procedure 583 for failure to prosecute within five (5) years, until at least six (6) months after the appeal becomes final in the case of Great American Insurance Company vs. Corradetti, et al. Superior Court of The State of California for the County of Shasta, Action No. 49628, which is now pending in the Court of Appeal Third Appellate District Action No. 3 Civil 17097. Six months after the remitter(sic) is filed in said appeal, defendant may,

if it chooses, seek the dismissal of this action pursuant to Code of Civil Procedure 583.

Dated Dec.12, 1977 /S/_____
Frank R. Sargent
in Propria Person

Dated Dec.12, 1977 COOLEY,GODWARD,CASTRO, HUDDLESON & TATUM

By:/S/_____
Patrick J.Mahoney
Attorney for Defendants
Great American Ins. Co.

ORDER OF COURT TO CONTINUE
PRETRIAL CONFERENCE AND TRIAL
PENDING DECISION OF COURT OF APPEAL

(NOTE) No proper order was ever prepared and submitted by the defendant to the court for signature. The defendant's Motion to Continue, granted by the Court, therefore, becomes the only order available for consideration on appeal. The pertinent text, and Reporter's Transcript, verifying it, are as follows.

(PLEASE TAKE NOTICE THAT ON OCTOBER 25, 1978 AT 9:30 A.M., OR AS SOON THEREAFTER AS THE MATTER CAN BE HEARD IN THE ABOVE COURT, DEFENDANT GREAT AMERICAN INSURANCE COMPANY (GREAT AMERICAN) WILL AND HEREBY DOES MOVE THE COURT FOR AN ORDER CONTINUING THIS ACTION FOR PRE-

TRIAL AND TRIAL PURPOSES UNTIL AT LEAST SIX (6) MONTHS AFTER THE APPEAL IN THE CASE GREAT AMERICAN INSURANCE COMPANY VS. FRANK R. SARGENT, COURT OF APPEAL, THIRD APPELLATE DISTRICT, 3 CIVIL NO. 17097 IS DECIDED.) (Clerk's record-page 98.)

Reporter's transcript of hearing on December 20, 1978, where the court denied plaintiff's Motion to Rescind Order to Continue Case , shows plaintiff's motion to be the precise order.

MR. SARGENT:(YOUR HONOR, IS THE MOTION TO CONTINUE THE CASE BEING GRANTED PURSUANT TO MR. MAHONEY'S WISHES THAT IT FOLLOW THE FINAL JUDGEMENT IN THE OTHER CASE?)

THE COURT:(THAT'S CORRECT)

MR. SARGENT: (NO ARGUMENT WILL BE RECEIVED ON THAT?)

THE COURT: (I'VE READ YOUR PAPERS. NO ARGUMENT WILL BE RECEIVED.)

(Reporter's Transcript 6:15 and also at Clerk'sRecord at 382:15).

EXCERPTS FROM RECORD SHOWING WHEN FEDERAL RIGHT WAS FIRST ASSERTED IN THE TRIAL COURT

Opposition to Motion to Continue action-Points and Authorities: October 25, 1978

3.(THE CASE IS NOW SCHEDULED FOR PRETRIAL CONFERENCE, ALL CONTEMPLATED DISCOVERY IS NEAR COMPLETION AND THE CASE CAN REASONABLY BE EXPECTED TO BE CONCLUDED BEFORE THE FIVE (5) YEAR STATUTORY LIMITATION EXPIRES ON JANUARY 3, 1979. ANY DELAYS OCCASSIONED BY THIS MOTION WILL BE A VIOLATION OF PLAINTIFF'S RIGHTS TO DUE PROCESS.
(Clerks Record 148:1-5)

Plaintiff's Motion to Rescind Order Continuing Case December 20, 1978

8.(LASTLY, AND MORE IMPORTANTLY, THE ORDER SUSTAINING DEFENDANT'S MOTION TO CONTINUE CASE, IN THE LIGHT OF PRIOR PROCEEDINGS, EFFECTIVELY NON-SUITS THE PLAINTIFF AND FOR ALL INTENTS AND PURPOSES, DISMISSES HIM.

9.(HERETOFORE DEFENDANT GREAT AMERICAN INSURANCE CO. ENTERED INTO A STIPULATION WHEREBY HE AGREED TO NOT SEEK DISMISSAL OF THIS CASE PURSUANT TO SEC. 583-C.C.P. "UNTIL SIX MONTHS AFTER THE SHASTA APPEAL BECOMES FINAL." DEFENDANT'S MOTION TO CONTINUE PRE TRIAL CONFERENCE AND TRIAL "UNTIL SIX MONTHS AFTER SHASTA

APPEAL BECOMES FINAL" HAS BEEN SUSTAINED BY THE COURT AND UNLESS THAT ORDER IS RESCINDED IT AMOUNTS TO A FINAL JUDGEMENT IN THIS CASE FOR THE DEFENDANT, REGARDLESS OF WHO PREVAILS IN THE SHASTA APPEAL. PLAINTIFF IS PRECLUDED, BY THE ORDER, FROM TRYING HIS CASE UNTIL SUCH TIME AS DEFENDANT, AT HIS PLEASURE, MAY MOVE FOR A DISMISSAL.)
(CLERK'S RECORD-153D:9-20)

STATUTES
CONSTITUTIONAL PROVISIONS

California Code of Civil Procedure
Sec.583. Dismissal; lack of prosecution; failure to bring action to trial.

(a) Inapplicable (2 year statute)

(b) Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action be brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended.

(c) Inapplicable (New trial-time for).

(d) Inapplicable (Mistrial).

(e) Inapplicable.

(f) The time during which the defendant was not amenable to the process of the court and the time during which the jurisdiction of the court to try the action is suspended shall not be included in computing the time period specified in any subdivision of this section.

FEDERAL RULES OF PROCEDURE

Rule 41. Dismissal of actions.

(a) Inapplicable (Voluntary dismissal).

(b) Involuntary dismissal:
Effect thereof.

For failure of the plaintiff to prosecute or to comply with these rules, or any order of court, a defendant may move for dismissal of an action or of any claim against him. ------.------.

(c) Inapplicable (Counterclaims).

(d) Inapplicable (Costs).

FEDERAL STATUTES

28 USC 1257. State Courts: appeal; certiorari.

Final judgements or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) Inapplicable

(2) By appeal, where is drawn in question the validity of a statute of any state on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) Applicability unnecessary.

UNITED STATES CONSTITUTION

Amendment V-Due Process;

No person shall be------,deprived of life, liberty or property, without due process of law;---.

Amendment XIV-Privileges and immunities; Due Process; Equal protection;

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, r property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws.

No. 83-1069

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

FRANK R. SARGENT,
Appellant,

vs.

CALIFORNIA SUPREME COURT, CALIFORNIA COURT OF APPEAL—SECOND APPELLATE DISTRICT, GREAT AMERICAN INSURANCE COMPANY,
Appellees.

On Appeal from the California Court of Appeal Second Appellate District

MOTION OF APPELLEE GREAT AMERICAN INSURANCE COMPANY TO DISMISS OR AFFIRM

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February 2, 1984

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I

INTRODUCTION

Appellee Great American Insurance Company (referred to hereinafter as "Appellee") moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the California Court of Appeal, Second District, on the ground that jurisdiction has not been properly invoked because the asserted federal question was not presented to, nor was it considered or decided by, the court below.

II

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal purports to raise the question whether California Code of Civil Procedure section 583(b),[1] mandating dismissal of civil actions which are not brought to trial within five years after commencement, violates the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

B. The Proceedings Below

Appellant filed a civil action against Appellee, among others, in the Superior Court of California, County of San Francisco, on January 4, 1974. On October 19, 1978, Appellant filed a written stipulation between Appellee and Appellant extending the five year time limit set forth in Code of Civil Procedure Section 583(b). At the expiration of the five year period as extended by the stipulation, trial of Appellant's action had not commenced. Following a hearing noticed by Appellee, the action was ordered dismissed with prejudice on June 23, 1980. Appellant noticed

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[1]Code of Civil Procedure section 583(b) (Stats. 1905 ch. 271 § 1, as amended (Deering, 1972) reads as follows:

> Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendants, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended.

a timely appeal to the California Court of Appeal, California's court of last resort except for discretionary review by the California Supreme Court.[2]

The California Court of Appeal affirmed the judgment of dismissal by an unpublished opinion reprinted in the appendix to Appellant's Jurisdictional Statement at pages App. 1-App. 10. Appellant's petition for rehearing before the Court of Appeal was denied and his petition for a discretionary hearing before the California Supreme Court was denied. See page App. 11 of Appellant's Jurisdictional Statement. As review by the California Supreme Court is

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[2]Article VI, section 11, of the California Constitution (Deering, 1974) provides as follows:

> The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction . . . .

Rule 29 of the California Rules of Court (Deering, 1980) states:

> (a) A hearing in the Supreme Court after decision by a Court of Appeal will be ordered (1) where it appears necessary to secure uniformity of decision or the settlement of important questions of law; (2) where the Court of Appeal was without jurisdiction of the cause; or (3) where, because of disqualification or other reason, the decision of the Court of Appeal lacks the concurrence of the required majority of qualified judges.
>
> (*b*) *As a matter of policy, on petition for hearing the Supreme Court normally will not consider:*
>
> *(1) any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal;*
>
> (2) any issue or any material fact that was omitted from or misstated in the opinion of the Court of Appeal, unless the omission or misstatement was called to the attention of the Court of Appeal in a petition for rehearing. All other issues and facts may be presented in the petition for hearing without the necessity of filing a petition for rehearing. [Emphasis added.]

discretionary, see footnote 2, *supra*, it is the decision of the California Court of Appeal, Second District, which Appellant seeks to bring before this Court. *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678, n. 1 (1968); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 160 (1954).

III

ARGUMENT

A. Appellant Did Not Raise, And The Court Below Did Not Consider Or Decide, The Asserted Federal Question

This appeal should be dismissed because Appellant did not raise the purported federal question before the California Court of Appeal and that court did not consider or decide the question. 28 U.S.C. section 1257(2) is the jurisdictional predicate for this appeal. See Appellant's Jurisdictional Statement at p. 2. That section requires that the judgment or decree appealed from have "drawn in question" a state statute as repugnant to the Constitution, treaties or laws of the United States.

The opinion of the California Court of Appeal makes no reference whatever to Appellant's asserted due process claims. In that circumstance the Court will assume "that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show to the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969). Rule 15.1(g) of the Court's rules require that Appellant specify the manner in which the federal question was raised in both the court of first instance and the appellate court. Appellant has failed to do so.

Appellant has failed to show that the asserted federal question was raised in opposition to Appellee's motion to dismiss the action in the trial court, or that it was raised before the California Court of Appeal. The only reference Appellant made in the courts below to due process is set forth at page App. 18 of Appellant's Jurisdictional Statement: "Any delays occasioned by this motion will be a violation of plaintiff's rights to due process." That one sentence was written not in opposition to Appellee's motion to dismiss the action under California Code of Civil Procedure section 583(b), the statute under attack in this appeal, but in a brief in opposition to an unrelated motion heard nearly two years before the dismissal, on October 25, 1978.[3] The asserted federal question was not raised before the trial court when it granted Appellee's motion to dismiss the action pursuant to Code of Civil Procedure section 583(b), and was never raised before, considered or decided by the California Court of Appeal.

This Court has ruled on numerous occasions that jurisdiction attaches only when the Federal question has been raised at the proper time in the state court proceeding. *Webb v. Webb,* 451 U.S. 493, 496-499 (1981); *Cardinale v.*

---

[3]Even if it is assumed, *arguendo,* that the sentence quoted above was before the trial court at the time it ruled to dismiss the action, it cannot be concluded that the federal question was properly raised in the state court. First, although Appellant's briefs in the California Court of Appeal are not part of the record, they make absolutely no mention of any "due process" claims. Second, Appellant did not specify that the Federal Constitution was being raised in using the term "due process." The California Constitution, Article I, section 7 (Deering 1974), provides a right to "due process" as well: "A person may not be deprived of life, liberty or property without due process of law . . . ."

Louisiana, 394 U.S. 437, 438 (1969). The Court stated in *Webb v. Webb*, *supra*, 451 U.S. at 499, that

> it is appropriate to emphasize again . . . that there are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts.

Appellant may not raise the federal question for the first time before this Court. *White River Lumber Co. v. Arkansas ex rel. Appelgate*, 279 U.S. 692, 700 (1929).

IV

CONCLUSION

Wherefore, Appellee respectfully submits that the Court's jurisdiction has not been reached, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the California Court of Appeal, Second District.

Respectfully submitted,
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February 2, 1984